

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK LAWELLNYE CHEATUM,

Defendant-Appellant.

UNPUBLISHED

July 14, 2005

No. 255261

Muskegon Circuit Court

LC No. 03-049649-FH

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault of a prison employee, MCL 750.197c, relating to spitting on a corrections officer. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to three to six years' imprisonment. Because defendant has not shown insufficiency of the evidence, or that the trial court erred when it instructed the jury, we affirm.

Defendant first argues that the prosecution presented insufficient evidence to convict him of assault of a prison employee pursuant to MCL 750.197c. When we review a claim of insufficient evidence we "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citations omitted). In order to establish the crime of assault of a prison employee, the prosecution must show the following elements: 1) defendant was lawfully imprisoned or confined 2) in a jail or other lawful place 3) through the use of violence, threats of violence, or dangerous weapons 4) assaults an employee of the place he is confined 5) knowing that the person was an employee of the place of confinement. MCL 750.197c.

The parties stipulated to the first two elements of the crime and defendant's testimony verified that he knew the officer was a prison employee. Therefore, the only elements at issue are the assault and violence elements. Assault is an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996), citing *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551 (1985). Assault is a specific intent crime, therefore the prosecutor must prove that defendant intended to spit. The existence of an injury is irrelevant. *Terry, supra*, at 662-663, citing *People v Datema*, 448 Mich 585, 592, n 8; 533 NW2d 272 (1995). "The intent of the defendant may be established by circumstantial evidence." *Terry*,

supra, at 663, citing *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Violence in assaults is “any wrongful application of physical force against another person so as to harm or embarrass him” *People v Boyd*, 102 Mich App 112, 116; 300 NW2d 760 (1980).

Defendant was housed in the maximum security section of the prison on November 20, 2003. That day, officers responded to a report of a disturbance on the second floor of the prison. Officers discovered defendant throwing his bin. Officers ordered defendant return to his cell and “lock down.” Defendant initially refused and swore, but eventually submitted when other officers arrived to assist. After securing the area, Deputy Jason Cerka finished his rounds and returned to defendant’s cell. Defendant called Cerka a vulgar name and as Cerka turned to face defendant, defendant spit at his face. Cerka reported that defendant’s saliva hit his mouth, nose, arm, and glasses.

At trial, Cerka testified that defendant spit on his face and described the events leading up to the incident. Several officers corroborated Cerka’s testimony regarding the events leading up to the incident. Two officers testified that they saw Cerka wiping saliva from his face. There was also testimony that after the incident defendant stated that next time he intended to throw urine at the officers. Officers searched defendant’s cell and found an apple juice container that smelled like urine. The prosecution did not preserve the actual saliva on the officer’s shirt and did not present video evidence from security cameras.

The jury is allowed to consider all circumstantial evidence and draw reasonable inferences from that evidence. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999). Based on the testimonial evidence of the officers and other circumstantial evidence, there was sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that defendant had assaulted the officer with violence.

Defendant next argues that the trial court erred by failing to instruct the jury regarding the definition of violence as it is set out in CJI2d 17.14. Although defendant objected to the jury instructions at trial, he did so on different grounds. Therefore the issue is not preserved for our review. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review unpreserved claims concerning improper jury instructions for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, we review jury instructions as a whole to determine if manifest injustice occurred. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Even if the instructions are somewhat imperfect, no error exists if the instructions fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *Id.* at 210-211. An omission in the jury instructions does not create an error if the charge as a whole covers the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

When the “touch” is at issue in a battery, CJI2d 17.2 n1 states that the trial court should advise the jury regarding the definition of violence set forth in CJI2d 17.14, “use of physical force against another person so as to harm or embarrass.” Here, the trial court instructed the jury that battery is a “forceful, or violent, or offensive touching” The trial court also explained to the jury that an assault is an attempted battery or making the officer reasonably fear an immediate battery. The trial court also instructed the jury that the crime of assault is a specific

intent crime and that defendant must intend to do the act. It did not instruct the jury on the definition of violence as it is set out in CJI2d 17.14.

When we read the instructions as a whole, we find no error affecting substantial rights. Defendant was convicted pursuant to MCL 750.197c, which requires proof that he assaulted with violence. Although the trial court did not give the definition of violence, it did state that force, violence, or harm must be intended in the act, which is consistent with the requirements of the statute. If anything, the trial court's failure to give the definition raised the standard by which plaintiff could be convicted because the lay understanding of the term "violence" is not likely to include actions that only "harm or embarrass." Accordingly, no error occurred.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Pat M. Donofrio